

HOUSE BILL REPORT

SHB 2935

As Passed House:
February 26, 2010

Title: An act relating to environmental and land use hearings boards.

Brief Description: Regarding environmental and land use hearings boards and making more uniform the timelines for filing appeals with those boards.

Sponsors: House Committee on General Government Appropriations (originally sponsored by Representatives Van De Wege, Sells, Blake, Takko, Darneille, Walsh, Hinkle and Kessler; by request of Governor Gregoire).

Brief History:

Committee Activity:

General Government Appropriations: 1/28/10, 2/5/10 [DPS].

Floor Activity:

Passed House: 2/26/10, 89-7.

Brief Summary of Substitute Bill

- Creates the Environmental and Land Use Hearings Office by consolidating the powers, duties, and functions of the Environmental Hearings Office and the Growth Management Hearings Boards.
- Reduces the numbers of state boards that conduct administrative review of environmental and land use decisions.

HOUSE COMMITTEE ON GENERAL GOVERNMENT APPROPRIATIONS

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 12 members: Representatives Darneille, Chair; Takko, Vice Chair; McCune, Ranking Minority Member; Blake, Dunshee, Hudgins, Kenney, Pedersen, Sells, Short, Van De Wege and Williams.

Minority Report: Do not pass. Signed by 1 member: Representative Klippert.

Staff: Owen Rowe (786-7391).

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Background:

Environmental Hearings Office.

The state Environmental Hearings Office (EHO) contains five boards that hear appeals from decisions made by state and local regulatory agencies. Each board has powers and procedures typical of an adjudicative tribunal, such as the power to administer oaths, take depositions, issue subpoenas, and conduct investigations. The EHO boards conduct administrative hearings and issue written decisions that outline the facts and relevant law for each case. The EHO includes the Pollution Control Hearings Board (PCHB), the Shorelines Hearings Board (SHB), the Environmental and Land Use Hearings Board (ELUHB), the Forest Practices Appeals Board (FPAB), and the Hydraulic Appeals Board (HAB). The EHO is independent of state and local regulatory agencies.

The PCHB hears appeals from orders and decisions made by the Department of Ecology (Ecology), local conservation districts, local air pollution control boards, and local health departments. There are three members on the PCHB, and the chair of the PCHB must also be the chair of the Shorelines Hearings Board.

The SHB hears appeals of permit decisions and shoreline penalties issued by local governments and Ecology. The Shoreline Management Act (SMA) provides for the regulation and management of development along the state shorelines. Local governments initiate the planning and administer a regulatory program consistent with the SMA, which includes administering and issuing shoreline substantial development, conditional use, and variance permits. Shoreline conditional use and variance permits granted by local governments must be reviewed by Ecology, which then issues the final decision. Local governments and Ecology may also issue fines under the SMA. The SHB hears appeals of shoreline-related permits and penalties. There are six members on the SHB, three of which must be the three members of the PCHB. The chair of the SHB must also be the chair of the PCHB.

The ELUHB is composed of six members, three of which are the SHB members serving as members of the PCHB. At least one member is an attorney. The three other members of the ELUHB, who serve part-time, are: the State Land Commissioner or designee, one representative from the Washington State Association of Counties, and one representative from the Association of Washington Cities. The chairperson of the PCHB is the chairperson of the ELUHB. The ELUHB hears petitions from certain permit decisions of state agencies, air agencies or local governments, involving an economic development project located within a county that qualifies as a distressed area and a natural resources impact area.

The FPAB hears appeals of decisions made by the Department of Natural Resources (DNR), including the approval or denial of forest practices applications, civil penalties, stop work orders, and notices to comply.

The HAB has exclusive jurisdiction to hear appeals arising from the approval, denial, conditioning, or modification of a hydraulic permit issued by the Washington Department of Fish and Wildlife for the diversion of water for agricultural irrigation or stock watering purposes, for stream bank stabilization to protect farm and agricultural lands, or for off-site

mitigation plans. The HAB also has jurisdiction to hear appeals of the approval, denial, conditioning, or modification of a hydraulic permit for the construction, replacement, or repair of a marine beach front bulkhead or rock wall.

Growth Management Act/Growth Management Hearings Boards.

The Growth Management Act (GMA) is the comprehensive land use planning framework for county and city governments in Washington. Enacted in 1990 and 1991, the GMA establishes numerous requirements for local governments obligated by mandate or choice to fully plan under the GMA and a reduced number of directives for all other counties and cities.

The GMA establishes three regional Growth Management Hearings Boards (GMHBs): an Eastern Washington board, a Central Puget Sound board, and a Western Washington board. Each GMHB consists of three full-time members qualified by experience or training who also meet residency requirements. Compositional provisions for GMHBs require at least one member to be an attorney in Washington and at least one member to have been a city or county elected official. Additionally, no more than two members of a GMHB may be from the same political party. The GMHB members are appointed by the Governor to six-year terms. The 2009 enacted operating budget Chapter 564, Laws of 2009 assumed a reduction of GMHB members from nine to eight.

The GMHBs have limited jurisdiction and may only hear and determine petitions alleging:

- that a state agency or planning jurisdiction is noncompliant with the GMA, specific provisions of the SMA, or certain mandates of the State Environmental Policy Act relating to qualifying plans, regulations, or amendments; or
- that the 20-year planning population projections adopted by the Office of Financial Management should be adjusted.

The GMHBs must make findings of fact and prepare a written decision in each decided case. Findings of fact and decisions become effective upon being signed by two or more members and upon being filed at the applicable GMHB office. Decisions of a GMHB may be appealed to the applicable board within 60 days. Final decisions of the GMHBs may be appealed to the superior court.

The GMHBs are governed by statutory requirements for conduct and procedure. For example, a majority of a GMHB constitutes a quorum for making decisions, adopting rules, and conducting other official business.

Summary of Substitute Bill:

The Environmental and Land Use Hearing Office (ELUHO), a single quasi-judicial land use and adjudicatory agency is created by consolidating the powers, duties, and functions of the EHO and the GMHBs.

On July 1, 2010, the EHO consists of the PCHB, the SHB, and the ELUHB. The FPAB and the HAB functions are transferred to the PCHB.

On July 1, 2011, ELUHO is created and will consist of the PCHB, the SHB, the ELUHB, and the GMHB. Not later than July 1, 2012, the GMHB must consist of seven members qualified by experience or training in matters pertaining to land use law or land use planning. The Governor may reduce the GMHB to six members if warranted by the GMHB's caseload. The Governor must designate one member of either the PCHB or the GMHB to be the Director of the ELUHO during the term of the Governor. The Director may appoint one or more administrative appeals judges in the cases before the environmental boards, and with the consent of the chair of the GMHB, one or more hearing examiners in cases before the GMHB. The administrative appeals judges possess the powers and duties conferred by the Administrative Procedures Act.

The PCHB has jurisdiction to hear and decide appeals from the DNR, the Department of Fish and Wildlife (WDFW), and the Parks and Recreation Commission. This includes decisions of the DNR and the WDFW that are reviewable under the Forest Practices Act, and the DNR appeals of county, city, or town objections under the Forest Practices Act other than requests for mitigation by forest landowners who violate rules violations to forest land conversions. Additionally, the PCHB has jurisdiction over forest health hazard orders, decisions by the WDFW relating to a hydraulic project approval permit, and decisions by the DNR relating to surface mining. The PCHB also has jurisdiction over decisions of a state agency to take temporary possession of a derelict vessel.

The PCHB, SHB, and ELUHB may schedule a conference for the purposes of attempting to mediate a case upon the request of one or more parties and with the consent of all the parties. Mediation must be conducted by an administrative appeals judge or other duly authorized agent of the board who has received training in dispute resolution techniques or has a demonstrated history of successfully resolving disputes.

Any person with standing may commence an appeal to the PCHB by filing a notice of appeal within 30 days from the date of receipt of the decision being appealed. The appeal is timely if it is filed with the PCHB and served upon the state or local agency within the same 30-day period. The appeal must contain: (1) the appellant's name and address; (2) the date and docket number of the order, permit, license, or decision appealed; (3) a copy of the order, permit, license, or decision that is the subject of the appeal; (4) a clear, separate, and concise statement of every error alleged to have been committed; (5) a clear and concise statement of the facts upon which the requester relies to sustain his or her statement of error; and (6) a statement setting forth the relief sought. Any party aggrieved by a final decision and order of the PCHB may obtain judicial review of the final decision and order. The state or local agency that issued the decisions appealed to the PCHB can also obtain judicial review.

If Ecology disapproves a comprehensive solid waste management plan or plan amendments prepared by a county or a city, the county or city may appeal the decision to the PCHB.

A Hydraulic Project Permit may be appealed to the PCHB within 30 days from the date of the receipt of the decision by the WDFW. Issuance, denial, conditioning, or modification of a Hydraulic Project Permit may be informally appealed to the WDFW within 30 days from the date of receipt of the decision. Requests for informal appeals must be filed in the form and manner prescribed by the the WDFW by rule. A permit decision that has been

informally appealed to the WDFW is appealable to the board within 30 days from the date of receipt of the WDFW's decision on the informal appeal. Issuance of a penalty for a hydraulic project permit violation may be informally appealed to the WDFW within 30 days from the date of receipt of the penalty. A penalty that has been informally appealed to the WDFW is appealable to the PCHB within 30 days from the date of receipt of the WDFW's decision on the informal appeal.

A person seeking to contest the temporary possession or custody of a derelict vessel by a state agency may appeal to the PCHB within 30 days of the date the state agency acquired custody of the vessel. The PCHB must hear and determine the validity of the decision to take the vessel. Within five days after the request for a hearing, the PCHB must notify the vessel owner and the state agency of the date, time, and location for the hearing. A proceeding brought regarding a derelict vessel may be heard by one member of the PCHB, whose decision is the final decision of the PCHB.

A petition for review of a decision for a shoreline development permit or a shoreline substantial development permit to the SHB must be commenced within 30 days from the date of receipt of the decision. Construction under a shoreline development permit or a shoreline substantial development permit must include provisions to assure that construction does not begin until after 30 days from the date of receipt or until all review proceedings are terminated, if the proceedings were initiated within 30 days from the date of receipt. Decisions on permits on shorelines of the state may be appealed to the SHB by filing a petition for review within 30 days of the date of receipt of the decision. Ecology's final decision on a proposed master program or master program amendment by a local government planning under GMA may be appealed to the GMHB by filing a petition within 60 days from the date of Ecology's final decisions to approve or reject a proposed master program or master program amendment. Ecology's written notice must conspicuously and plainly state that it is Ecology's final decision and there will be no further modifications. Any person incurring a penalty under the SMA may appeal the penalty to the SHB within 30 days after the date of receipt of the penalty.

This act applies only to appeals that are commenced on or after the effective date of this act. Various sections concerning the FPAB and the HAB are repealed. However, these repeals do not affect any existing right acquired or liability or obligation incurred under these statutes, nor do they affect any proceeding instituted under them. All pending cases before the FPAB and the HAB must be continued and acted upon by those boards. All existing rules of the FPAB remain in effect to be used by the PCHB until the PCHB adopts superseding rules for forest practices appeals.

Appropriation: None.

Fiscal Note: Preliminary fiscal note available.

Effective Date: The bill takes effect 90 days after adjournment of the session in which the bill is passed, except sections 1, 3, 5, 7, 9-14, and 16-42, relating to reducing the number of appeals boards under the Environmental Hearings Office, which take effect July 1, 2010, and sections 2, 4, 6, 15, and 43, relating to the creation of the Environmental and Land Use

Hearings Office, which take effect July 1, 2011, and section 8, relating to the Pollution Control Hearings Board jurisdiction which takes effect June 30, 2019.

Staff Summary of Public Testimony:

(In support) This bill supports the informal appeals process that is an important outlet for these types of hearings. The unification of appeals deadlines to 30 days makes sense, we support 30 day appeals for the GMHB. This bill is one of five bills introduced as part of the natural resource agency reform effort. There was a substantial amount of public outreach and involvement in drafting this bill. This bill saves money, reduces the current five hearings boards under the EHO to two, and makes the appeals process easier for the public to navigate by standardizing timelines. This bill consolidates two quasi-judicial agencies into one single agency, there are advantages to the public through this consolidation. We support this bill especially the proposed substitute that removes section 17.

(In support with substitute) We support the proposed substitute and not the bill as originally drafted; appeals to the GMHB should stay at the 60 day appeal deadline in current law.

(With concerns) We are working with the DNR with language we can all agree on to mitigate the potential for increased costs to forest landowners. The current FPAB that is eliminated under this bill works very well for us. We are concerned that if this legislation passes that cases could be delayed or increase costs to appellants.

(Opposed) None.

Persons Testifying: (In support) Representative Van De Wege, prime sponsor; Josh Weiss, Washington State Association of Counties; Peter Birch, Washington Department of Fish and Wildlife; John Mankowski, Office of the Governor; Kathleen Mix, Environmental Hearings Office; Lenny Young, Department of Natural Resources; and Cheryl Smith, Washington State Department of Commerce.

(In support with substitute) April Putney, Futurewise.

(With concerns) Debora Munguia, Washington Forest Protection Association.

Persons Signed In To Testify But Not Testifying: None.